IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8028 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; 3 to 5 NO.

ANVARKHAN R MAKARANI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 8028 of 1988

MR CHETAN K. PANDYA for MR SV RAJU for Petitioner

MS HANSA PUNANI, AGP for Respondent No. 1

RULE SERVED for Respondent No. 2,4

MR MC BAROT for Respondent No. 3

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 28/09/2001

C.A.V. JUDGEMENT

1. By this petition under Article 226 of the Constitution, the petitioner-workman has prayed for a

direction to regularise his service on the post of a clerk in Danta Taluka Panchayat with all consequential and incidental benefits. As the service of the petitioner was alleged to have been terminated on the day the petition was filed, i.e. 30.11.1988, a further prayer by an amendment is made to set aside the alleged oral order of termination.

2. According to the petition, the petitioner, being qualified and registered with the employment exchange, was appointed from 3.3.1983 as a work charge clerk for a period of 29 days in the respondent No.2 - Danta Taluka Panchayat. Subsequently, he continued to be employed as a clerk or mistry on similar appointment orders employing him for a fixed period of 29 days with a clear break of seven months from May 1983 to December, 1983. The successive orders of appointment on or for specific job and for specific periods are placed on record. The last such order dated 1.11.1985 appointed the petitioner as a mistry on daily wage basis with the stipulation that he could be relieved at any time without notice. Thereafter, by an order dated 11.2.1987 of the Executive Engineer, Roads & Buildings, Panchayat Department No.1, Palanpur, the petitioner along with 117 other persons was appointed as work-charge clerk on purely temporary basis and with the express condition that the appointment was on `scarcity relief work' and would automatically come to an end with the closing of the relief works. It appears that by an order dated 30.7.1988 of the Taluka Development Officer, the petitioner was relieved with effect from 31.7.1988 on termination of the scarcity relief work. Immediately after that, on 1.8.1988, the petitioner made a fresh application for appointment which was considered by the Taluka Panchayat in its meeting dated 14.10.1988 and it was resolved to appoint the petitioner after obtaining prior permission of the District Panchayat. However, the District Panchayat having not approved the appointment, the petitioner was no more employed by any of the respondents. The allegation of the petitioner that he continued to work in the same office under the same employer from 1.8.1988 till he was orally discharged on 30.11.1988, is denied in the affidavit of the Taluka Development Officer, according to which, after the termination of the petitioner's service from 30.7.1988, the petitioner had never worked. It is also stated by the Taluka Development Officer that the petitioner had along with other employees filed Special Civil Application No.1577 of 1988 through their Union and the fact of its disposal by this Court was suppressed in the petition. It is admitted by the petitioner in his rejoinder that he had

joined in the Special Civil Application No.1577 of 1988 as a petitioner and as one of the persons who were working in the scarcity relief work. Thus, the service of the petitioner or continuation thereof after 30.7.1988 till the alleged oral termination is in dispute. And the alleged oral termination on 30.11.1988, the legality and validity thereof as also whether such alleged oral termination amounted to "retrenchment" and whether any of the mandatory provisions of the Industrial Disputes Act, 1947 were violated, involve disputed questions of fact which cannot be resolved in this proceedings.

3. On the basis of the above facts, it was contended on behalf of the petitioner that the breaks brought about in the continuity of his service by issuance of orders of appointment for 29 days were artificial, that such practice was unfair and arbitrary, that the petitioner had put in continuous service of three years and also completed 240 days of work in the year preceding his termination and, therefore, the termination of his service was void ab initio for being in violation of the provisions of Section 25-F of the Industrial Disputes Act and that the petitioner was also entitled to regularization in service. It was also argued in the alternative that the termination of service of the petitioner being admittedly without notice or notice pay, the same also violated Rule 33 (1) (b) of the Bombay Civil Service Rules, 1959 ('the BCSR' for short). However, as seen earlier, the petitioner's case has to be considered on the basis that his service had been terminated on completion of the scarcity relief work and the factum of his alleged subsequent service as also the legality and validity of its termination having fallen in the area of disputed questions of fact cannot be decided. Therefore, the issue that falls for consideration is whether, disregarding the artificial breaks brought about by the successive orders of appointment for 29 days, the petitioner had acquired the status of a temporary employee entitled to notice and protection of Rule 33 (1) (b) of the BCSR. The learned counsel for the petitioner has, despite a specific query in that regard, failed to point out as to how the BCSR were applicable in the facts of this case. And, the fact which has to be borne in mind is that the petitioner was never appointed on or against a vacant post after undergoing any process of selection or regular recruitment.

4. Relying upon a judgment of this Court in MARIAMBEN AMIRBHAI v. STATE OF GUJARAT [1985 (2) GLR 946] and in DINESHKUMAR HIMATLAL NIMAVAT v. STATE OF GUJARAT [1987 (2) GLR 1146], it was submitted that by

resorting to the subterfuge of employing for 29 days at a stretch, an attempt was made to circumvent the provisions of the Rules and resort to such kind of unfair tactic by the State must be denounced. In the facts of those cases, the petitioners were either employed against a permanent post or continuation of interim relief against termination of such employees was in operation. In GHANSHYAM M. PANDYA v. STATE OF GUJARAT [1985 GLH (UJ) 51], the factum of 42 appointment orders during a period of little more than four years was taken to indicate that there was vacancy and the petitioner was appointed on such vacancy. It also appeared that appointments for only 29 days were given so that the employee would not acquire any right over the post to which he was appointed. The action of giving such appointments appeared to be arbitrary and the petitioner was held to have acquired the status of a temporary government servant. The oral order terminating the service of such employee was, therefore, also held to be arbitrary.

4.1 Relying upon a judgment of the Supreme Court in BHAGWATI PRASAD v. DELHI STATE MINERAL DEVELOPMENT CORPORATION [(1990) 1 SCC 361], it was urged that three years of experience and continuous service, ignoring artificial breaks created by the respondent, would be sufficient for confirmation of the petitioner. It was also pointed out from the said judgment that the petitioners were held to be entitled to equal pay at par with the persons appointed on regular basis on similar post and the petitioners who were ousted from service pending the petition were also ordered to be reinstated. It must be noted that, in the facts of that case, daily rated workmen of the respondent-corporation had approached the Court and the respondent had raised several questions of fact. The Court had directed the Industrial Tribunal to examine the contentions of the petitioners after taking evidence and the Tribunal had found that the petitioners were performing same or similar duties as were performed by the regular incumbents. The reason for non -regularisation was found to be a pretense and dismissal of certain workmen was also found to be arbitrary, discriminatory, illegal and by way of unfair labour practice. Accordingly, framing of a scheme for regularization of the service of the petitioners was directed.

4.2 Relying upon a judgment of this Court in SUB-DIVISIONAL SOIL CONSERVATION OFFICER, IDAR v. M.M.SAIYED [1990 (1) GLR 495], it was submitted that Rule 33 (1) (b) of the BCSR was attracted in case of termination of a temporary government servant and in

absence of the requisite notice, the order would get voided. It is, however, clearly observed in the judgment that if the service had come to be terminated by efflux of time under the last appointment order of 29 days, the situation would have been different. And, on facts, the government servant was found to have acquired the status of a temporary government servant.

4.3 The judgment of this Court in C.D.CHAUHAN v. RESERVE BANK OF INDIA [1991 (2) GLR 1192] was relied upon to submit that "right to work" was the most precious liberty and the right to livelihood was a part of `right to life'. If the State or its instrumentality cannot be compelled to provide adequate means, but when persons equally situated are sought to be offered the right to work in preference to those who have been working in the State or in its instrumentality, the Court can definitely jump into action and can perform the role expected of it. In fact, the important and distinct background in that case of regularisation of mazdoors in the Reserve Bank was that the workmen had been, after being qualified, selected and wait-listed for appointment, made to work as daily wage mazdoors even when vacancy had occurred or sanctioned posts were available. In GUJARAT AGRICULTURAL UNIVERSITY v. RATHOD LABHU BECHAR [AIR 2001 SC 706] relied upon by the petitioner, a scheme for regularisation was made and approved for absorption in a phased manner of daily wage workers who had completed ten years of service.

5. The first hurdle in consideration of the petitioner's case for regularisation on the basis of his alleged continuous service under the Taluka Development Officer for about two years is that not only the continuity is broken by the so-called artificial breaks but his posting and jobs as also the works on which he was employed are different. Each of the relevant appointment orders indicate separate heads under which the wages paid to the petitioner were to be accounted. Besides that, the petitioner appears to have submitted fresh applications for each of the appointments and his last appointment under the Executive Engineer, Roads and Buildings clearly appears to be altogether under a different employer on a clear condition and stipulation of termination at the end of the relief works. In such circumstances, a case for regularisation under the Taluka Development Officer on the basis of two years of alleged continuous service is not made out.

6. As against the facts and submissions as above, the learned counsel for respondent No.3 only relied upon

order of this Court in Special Civil Application No.3548 of 1997 by which the petition was dismissed in similar set of facts and the petitioner was relegated to alternative remedies including making of a representation.

7. In STATE OF GUJARAT v. P.J.KAMPAVAT [34 (1) GLR 848], a decision of the Supreme Court, it was held that Rule 33 (1) (b) of the BCSR was not applicable in such cases in view of the opening words of Rule 2 of the BCSR, which contained the non obstante clause ("except where it is otherwise expressed or implied"), and because the order appointing the respondents expressly stated not only that the service shall be terminated at any time without giving any notice and without assigning any reasons, but also that the appointment was for a limited period co-terminous with the concerned Minister's tenure. It was held that the terms of appointment and undertaking executed in those terms were clearly inconsistent with Rule 33 (1) (b) of the said Rules. The Supreme Court held that the appointment of the respondents was a pure and simple contractual appointment and that such appointment did not attract and was outside the purview of the BCSR, and no order of termination as such was necessary for putting an end to the service, much less a prior notice.

In SAVITABEN M. PATEL v. STATE OF GUJARAT [38 (2) GLR 1567], the appointment of the petitioners for 29 days was held to be a fixed term appointment and it was held that as per the terms and conditions of appointment, their services were liable to be terminated without any notice and Rule 33 (1) (b) of the BCSR was not attracted.

In NILESH BHATT v. ADMINISTRATIVE OFFICER, NAGAR PRADHAMIK SHIKSHAN SAMITI [1996 (1) GLH 108], where the appointment was itself ad-hoc, temporary and for a fixed term and subject to further stipulation that it was liable to be brought to an end earlier without notice, it was held that the principles of natural justice did not have to be followed while terminating the services of such employees. It was held that a person who was appointed on temporary basis did not acquire any substantive right to the post and that mere prolonged continuous ad-hoc service did not ripen into a regular service to claim permanent or substantive status.

In VITHALBHAI BABALDAS PATEL v. CHAIRMAN, OIL & NATURAL GAS COMMISSION, DEHRADUN [28 (2) GLR 1308], work-charge employees appointed for short periods according to contingencies could not claim that their

appointments should be made permanent. It was held that regular appointments under such authorities were required to be made in accordance with settled law or rules or regulations governing such appointments and the prescribed procedure. It was further held that if employment or appointment of temporary or ad-hoc appointee is regularised, guarantee of equality and equality of opportunity in matters of public employment enshrined in Articles 14 and 16 of the Constitution would be infringed, and such regularisation would encourage back-door appointments denying equality of opportunity to those who were eligible for the post.

In STATE OF U.P. v. AJAY KUMAR [1997 (4) SCC 88], the Supreme Court while considering the question of regularising the daily wagers, held that there must exist a post and either administrative instruments or statutory rules must be in operation to appoint a person to the post, and that daily wage appointment will obviously be in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists. The orders regularising the services of the daily wagers were, therefore, set aside.

In ASHWANIKUMAR v.STATE OF BIHAR [1997 (2) SCC 1], the Supreme Court held that where the initial entry itself was unauthorised and not against any sanctioned vacancy, the question of regularising the incumbent would never survive for consideration. It was held that the posts or vacancies must be backed up by budgetary provisions so as to be included within the permissible infrastructure of the scheme, and that any posting which is de hors the budgetary grant and on a non-existing vacancy, would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy.

Relying on the above judgments, this Court (Coram:R.K.Abichandani, J.) has, in Special Civil Application No.708 of 1989 and Special Civil Application No.5315 of 1992, rejected similar claims in similar set of facts.

8. Respectfully following the ratio of the judgments referred to hereinabove and in view of the fact that the employment of the petitioner under the respondent all throughout remained outside the regular set up and on a particular job or work as distinguished from being against any vacancy and the employment having been terminated in terms of the last appointment order appointing him on scarcity relief work, the petitioner is

neither entitled to reinstatement nor regularisation. It has also to be clarified and held that the petitioner has failed to establish that he had in any way acquired the status of a temporary government servant.

9. Under the circumstances and for the reasons discussed hereinabove, there is no substance in the contentions raised and the claims made in the petition and, therefore, the petition is rejected. Rule is discharged with no order as to costs.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)